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No. 97-485

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF CONNECTICUT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a district court order holding a defendant in civil contempt and stating the court's intention to appoint a special master is a final, appealable order under 28 U.S.C. 1291, or immediately appealable under the collateral order doctrine.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 116 F.3d 466 (Table). The opinion of the district court is reported at 931 F. Supp. 974 (D. Conn. 1996).

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1997. The petition for a writ of certiorari was filed on September 11, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Petitioners erroneously cite (Pet. 2) 28 U.S.C. 1281(1) as the basis for this Court's jurisdiction.

STATEMENT

1. In September 1985, the United States brought this action against the State of Connecticut, its Governor, the Commissioner of the Department of Mental Retardation, and the Director of the Southbury Training School, pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.* Pet. App. A7. The complaint alleged unconstitutional conditions of confinement at Southbury, an institution for persons with developmental disabilities. Pet. App. A3. The parties entered into a consent decree to remedy the unconstitutional conditions at Southbury, which the district court approved on December 22, 1986. Petitioners proposed a detailed plan to implement the decree's requirements, which the district court approved and entered as a remedial order on July 22, 1988. *Ibid.* The parties stipulated to two additional remedial orders to address continuing deficiencies at Southbury in April 1990 and December 1991. *Id.* at A3-A4.

These remedial orders impose requirements on petitioners to ensure that Southbury residents receive psychological services, medical care, and physical therapy that are administered pursuant to the exercise of professional judgment by qualified professionals. Pet. App. A10, A19 n.18, A25 n.30. For instance, petitioners are required to: (1) protect Southbury residents from unreasonable risks to personal safety by developing for each resident an overall plan of services that addresses behavior management and teaches necessary self-care skills (Pet. App. A10-A14); (2) have an interdisciplinary team review the overall plan of services for Southbury residents to determine if the training programs are appropriate

and to modify the training programs when necessary (*id.* at A10-A11 n.5); (3) implement policies and procedures to ensure that behavior modification medications are administered safely and not in lieu of behavioral training programs (*ibid.*); and (4) have a qualified physician "determine whether a physical therapy program should be initiated or an existing physical therapy program modified to prevent contractures, physical degeneration, and inappropriate body growth and deformity," and refer Southbury residents to a "registered physical therapist" as appropriate (*id.* at A25-A26 n.30).

2. After learning that petitioners repeatedly and systematically had failed to meet the requirements of the remedial orders, the United States in April 1995 filed an application for an order to show cause why petitioners should not be held in civil contempt. Pet. 3; Pet. App. A4. After a four-day evidentiary hearing, in June of 1996 the district court found, by clear and convincing evidence, that petitioners were in civil contempt. Pet. App. A28. In its lengthy opinion, the district court found that petitioners had violated the orders by failing to provide required psychological care (Pet. App. A10-A18), requisite medical care (*id.* at A19-A25), and necessary physical therapy services (*id.* at A25-A28). Southbury's "systemic flaws," the district court concluded, "have caused many residents to suffer grave harm, and in several instances, death." *Id.* at A29.[2]

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[2] In one instance, a Southbury resident burned to death while smoking after petitioners failed to implement a plan designed to prevent him from "burn[ing] holes in his clothing" or otherwise injuring himself with his "sloppy" smoking habits. Pet. App. A12-A13. Other Southbury residents were permitted to ingest dangerous substances despite a known propensity for

After weighing "the complex nature of the case, together with the delicate interests of [Southbury]'s residents," the district court found that it would be necessary to appoint "a special master to determine why [Southbury]'s efforts are not producing the Remedial Orders' intended results, and to make recommendations to the court." Pet. App. A31. The district court did not, however, appoint the special master in its June 1996 order.

3. Petitioners appealed, asserting that 28 U.S.C. 1291 and the collateral order doctrine provided the court of appeals with jurisdiction.

In an unpublished opinion, the court of appeals disagreed and dismissed the appeal. The court explained that, under 28 U.S.C. 1291, it has jurisdiction over only final decisions. "[A] finding of contempt unaccompanied by sanctions," it continued, "is not final and thus cannot support an appeal." Pet. App. A4 (citations omitted). The Court further rejected any suggestion that the appointment of a special master rendered the order appealable, because an "order referring a matter to a special master is not a final order appealable under 28 U.S.C. 1291." *Id.* at A4 (citations omitted). The court therefore concluded that "the district court's ruling in this case—finding defendants in contempt, imposing no sanctions, and stating the intent to appoint a special master—is not an appealable final decision. Nor does the court's

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so doing, *id.* at A14, were not properly treated for medical conditions or were over-medicated for their conditions, possibly contributing toward another death, *id.* at A19-A20, or were rendered "permanently bed-ridden" by petitioners' "inadequate physical therapy services," despite having been "ambulatory" just a few years earlier, *id.* at A28.

order qualify as an appealable order under the collateral order doctrine." *Id.* at A4-A5.

4. Shortly after petitioners' appeal was dismissed, the district court in July 1997 issued an order of reference in which it appointed a special master and set forth the special master's responsibilities, duties, and authority. Pet. App. A33-A38. Petitioners did not appeal that order. To the contrary, they consented to it. Pet App. A33-A34 (order entered "with the agreement of the parties").

ARGUMENT

Contrary to petitioners' contentions, the court of appeals' decision raises no issue warranting this Court's review. It raises no issue on which the courts of appeals are divided. It raises no issue of substantial national importance. And the primary contentions petitioners press in support of certiorari —objections to the content of an unappealed July 1997 reference order—are not now properly before the Court in any event.

1. Petitioners first argue (Pet. 5-8) that the district court's decision to appoint a special master was final and immediately appealable under 28 U.S.C. 1291.

As "a general rule a district court's decision is appealable under [28 U.S.C. 1291] only when the decision 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 275 (1988) (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)). This is true for post-judgment proceedings as well. See 15B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3916, at 349 (2d ed. 1992) ("[a]ppeal ordinarily should not be available as to any particular post-judgment

proceeding before the trial court has reached its final disposition").

The court of appeals properly held that, because an order appointing a special master is not final and therefore not immediately appealable under Section 1291, the June 1996 order stating *an intent* to appoint a special master was not final and thus not immediately appealable either. Pet. App. A3-A5. Petitioners do not dispute that, under normal circumstances, this holding would be entirely correct. See *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 290-291 & n.4 (1940); see also *George* v. *Victor Talking Machine Co.*, 293 U.S. 377 (1934). Nonetheless, petitioners argue that the appointment of a special master in this case is objectionable—and thus must be immediately appealable—because it "will be highly intrusive on state sovereignty and the ability of state officials to exercise their wide discretion, within constitutional bounds, in operating a state institution." Pet. 6; see Pet. 5-8. In particular, petitioners object to the special master's access to their documents and facilities, Pet. 6, to the special master's obligation to make specific recommendations for reform, *ibid.*, and to their obligation to pay the special master's reasonable costs, *ibid.* See also Pet. 14, 15, 18 (arguing about the alleged intrusion on state sovereignty).

These claims are not properly before the Court. The June 1996 order that petitioners appealed, and that is at issue in this petition, did not appoint a special master. Nor did it set forth his authority and duties. It merely "stated the [district] court's intent to appoint a special master." Pet. App. 4; see also *ibid.* (district court has "not yet chosen a special master"). The special master was not appointed and the conditions to which petitioners now object as

unduly intrusive—including not just the special master's duties and powers but also petitioners' obligation to pay the master's reasonable expenses—were not established until the district court issued its July 1997 reference order, a year after petitioners sought appellate review. See *id.* at A33, A36-39, A40-A41 (reference order issued in July of 1997).

Petitioners, however, failed to seek review of the July 1997 reference order. To the contrary, they *agreed to it* before the district court. See Pet. App. A33-A34 (order entered "with the agreement of the parties"). Because petitioners failed to attempt to appeal from the July 1997 order that imposed the conditions to which they now object, their complaints about that order are not properly before the Court. Moreover, this Court rarely reviews on certiorari the contentions of a party where, as here, the courts below have not had the opportunity to rule on them first. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *DeShaney* v. *Winnebago Dep't of Social Servs.*, 489 U.S. 189, 195 & n.2 (1982); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

In any event, the decision of the court of appeals was correct. Even if petitioners' contention regarding excessive intrusion into state functions were correct—and, as explained below, it is not—that contention still does not render the otherwise non-final June 1996 order "final." As this Court has held, an order appointing a special master "is generally interlocutory and not appealable, at least if not for a mere ministerial purpose." *Deckert*, 311 U.S. at 290-291 & n.4; see also *George*, 293 U.S. 377 (order appointing master to give an accounting to the court is inter-

locutory and not appealable).[3] If an order that actually appoints a special master is generally non-final under Section 1291, then surely an order that, like the June 1996 order at issue here, merely states the district court's *intent* to appoint a special master at some undefined point in the future must be non-final as well. If petitioners believed that immediate review of that order was necessary and indispensable despite its lack of finality, they should have sought mandamus.[4] This they did not do.

Besides, petitioners' assertion that the "special master has sweeping authority under the District Court's order and will be heavily involved in the day-to-day operation and management of [Southbury]," Pet. 4, is simply incorrect. To the contrary, the district court's orders are carefully crafted to ensure that this does *not* occur. Neither the district court's June 1996 order nor the unappealed July 1997 order authorizes the special master to manage any operations of Southbury. Instead, in accordance with Federal Rule of Civil Procedure 53(c), the district court's reference order instructs the master to conduct a

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[3] Given the factual inquiry that the special master here must make, it cannot be said that the master was appointed for a ministerial purpose.

[4] A serious abuse of the referral power can be corrected on mandamus, as this Court and many others have held. See *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256-259 (1957) (affirming use of mandamus to correct improper referral); *In re Bituminous Coal Operators' Ass'n, Inc.*, 949 F.2d 1165, 1167-1168 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (granting mandamus where scope of referral to special master exceeded proper bounds); *In re Pearson*, 990 F.2d 653, 656 (1st Cir. 1993) ("appointment of a master may be so far afield, and the potential for mischief so great in a particular situation, that immediate relief by way of mandamus is warranted").

limited, factual inquiry and to submit to the district court his findings and recommendations concerning what Southbury should do to comply with the remedial orders. Pet. App. A31, A36-A38.

Indeed, the district court's July 1997 reference order expressly provides that the "Special Master and his experts, consultants and staff members shall not be empowered to direct the Defendants or any of Defendants' personnel to take or refrain from taking any specific action to achieve compliance." Pet. App. A38. The order further clarifies that petitioners are to propose their own remedies to the greatest extent possible: The court's order specifically "encourage[s] and allow[s] the [petitioners] in the first instance to develop and propose remedies and criteria for compliance, should [petitioners] desire to do so." *Id.* at A36. And the order clearly retains for the district court and for the district court alone any and all authority to impose remedies. "Sole power to direct compliance and punish noncompliance remains with th[e]" district court. *Id.* at A38. Thus, the basis for petitioners' claimed need for immediate review—an allegedly improper intrusion into their operation of Southbury—simply does not exist.

2. Petitioners also argue (Pet. 11-12) that the June 1996 order was final because it found them in contempt. But the court of appeals correctly held (Pet. App. A4)—and petitioners appear to concede (see Pet. 17)—that a finding of contempt unaccompanied by sanctions ordinarily is not appealable as a final order. The courts of appeals repeatedly have so held. See, *e.g.*, *United States Steel* v. *Fraternal Ass'n of Steel Haulers*, 601 F.2d 1269, 1273 (3d Cir. 1979); *Petroleos Mexicanos* v. *Crawford Enterprises*, 826 F.2d 392, 398 (5th Cir. 1987); *Motorola* v. *Computer Displays Int'l*,

739 F.2d 1149, 1154 (7th Cir. 1984); *Weyerhaeuser Co.* v. *Longshoremen's and Warehousemen's Union, Local 21*, 733 F.2d 645, 645-646 (9th Cir. 1984); *Don's Porta Signs, Inc.* v. *City of Clearwater*, 829 F.2d 1051, 1053 n.7 (11th Cir. 1987), cert. denied, 485 U.S. 981 (1988).

Nonetheless, petitioners insist that there is a conflict among the circuits because other courts permit an immediate appeal "from a wide variety of post-judgment orders." Pet. 9, 10. In post-judgment proceedings, petitioners argue, an appellate court should be more flexible in determining whether a district court order is final under 28 U.S.C. 1291. *Ibid.*

None of the cases cited by petitioners, however, suggests that an order finding a party in civil contempt is final and appealable under 28 U.S.C. 1291 where the order, like the June 1996 order, fails to impose a sanction. To the contrary, the cases petitioners cite allow appeal not merely because the district court orders at issue adjudicate rights under consent decrees, but because those district court orders—unlike the district court order here—fully and finally adjudicate the matter by imposing a remedy as well.

Thus, contrary to petitioners' claims (Pet. 10), the district court order in *Kittitas Reclamation District* v. *Sunnyside Valley Irrigation District*, 763 F.2d 1032, 1034, n.1 (9th Cir.), cert. denied, 474 U.S. 1032 (1985), did not merely interpret water rights under a decree, but also "ordered water released from a Yakima water project" based on the interpretation. 763 F.2d at 1033. Consequently, the court of appeals there had before it a final and appealable question: "whether the district court had authority to" impose

the remedy it chose, *i.e.* "to order the water released." *Ibid.* Nowhere does *Kittitas* suggest that the Ninth Circuit would permit immediate appeal of a contempt order that, like the June 1996 order at issue here, imposed no remedy and no sanction. To the contrary, it is established Ninth Circuit law that such an order is not final and thus not immediately appealable under Section 1291. *Weyerhaeuser*, 733 F.2d at 645 (order finding appellant "in contempt for continuing to violate a previous injunction" was "not a final order under 28 U.S.C. §1291" absent "the imposition of sanctions").

For the same reason, petitioners' reliance on *Walker* v. *United States Department of Housing and Urban Development*, 912 F.2d 819 (5th Cir. 1990), is also misplaced. There, the district court not only "interpret[ed] obligations under a consent decree," Pet. 10, but also—based on its interpretation of the decree—ordered relief by requiring the Department of Housing and Urban Development "to continue past levels of funding" for certain apartment units. *Walker*, 912 F.2d at 826; see also *id.* at 825. *Walker* does not suggest that a contempt order unaccompanied by relief (*i.e.*, an order of sanctions) can be appealed immediately under Section 1291. Quite the opposite: It is settled law in the Fifth Circuit, as it is in other circuits, that contempt orders that do not impose sanctions are not final and thus cannot support immediate appeal under Section 1291. *Petroleos Mexicanos*, 826 F.2d at 398 (contempt order final and appealable only if there is both "a finding of contempt" and a "sanction for contempt").

Apparently aware of this, petitioners contend that the court of appeals erred in holding that no sanction was imposed because the appointment of a special

master was meant to be a sanction. See Pet. 11-12; contrast Pet. App. A4 ("the district court imposed no sanctions"). That fact-bound contention mischaracterizes the district court's orders. Those orders do not state that the appointment of a special master would itself constitute the "sanction" for contempt. Rather, the court makes it clear that the special master would be appointed to assist the court in its own efforts to devise an appropriate remedy. As the district court explained, the role of the special master would be "to determine why [petitioners'] efforts are not producing the Remedial Orders' intended results, and to make recommendations" for a remedy "to the court," Pet. App. A31; the "sole power to * * * punish noncompliance," the district court specified, "remains with [the] court," Pet. App. A38.[5] The district court's order thus itself makes clear that the special master was not appointed as a sanction, but rather as a method of determining the appropriate remedy.[6]

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[5] The district court's order instructs the master to take the following actions: (1) conduct a review of Southbury's care and treatment of residents that are covered by the remedial orders to determine the changes needed to meet the orders' desired ends; (2) specify methods to implement the required changes; and (3) work with the parties to effectuate those changes. Pet. App. A31. Even after the master files his report, further litigation may take place, as Federal Rule of Civil Procedure 53(e) provides parties the opportunity to object to the master's findings and recommendations.

[6] Besides, the supposed "sanction" petitioners rely upon as making the June 1996 order "final"—the appointment of a special master—itself was not imposed until one year after the June 1996 order was entered. See Pet. App. A33-A41. Because the very "sanction" petitioners rely upon as making the June 1996 order "final" was not imposed until much later, it is hard

3. Alternatively, petitioners appear to argue that, whether or not the appointment of a special master was a sanction, the Court should grant certiorari to determine whether "a finding of contempt *combined with* the appointment of a special master, under the circumstances of this case" should be immediately appealable. Pet. 16.

Petitioners do not cite any other case raising this fact-bound question. Moreover, the question is not even presented by this case. The Court cannot decide whether combining the appointment of a special master with a finding of contempt renders an order "final," because the June 1996 order that petitioners appealed did not in fact appoint a special master. Instead, the special master was appointed almost a year later in a separate order. See pp. 6-7 & 12 n.6, *supra*; Pet. App. A4, A33.

Besides, petitioners' contention is meritless. If an order appointing a special master and an order holding a party in contempt (*sans* sanctions) are both interlocutory when entered separately, combining both into a single order does not in itself render them "final." Finality depends on the practical effect of the orders. Here, neither the June 1996 order nor the unappealed July 1997 order completely resolves the issues before the court—the cause of petitioners' contempt and the remedy for it remain open for consideration—and the allegedly intrusive effects that petitioners claim to fear are precluded by the terms of the orders in any event.

4. Finally, there is no merit to petitioners' challenge to the court of appeals' holding that the district

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to see how the June 1996 order could be anything but interlocutory and non-final.

court's order was not appealable under the collateral order doctrine. Indeed, petitioners' expansive view of the collateral order doctrine would swallow up the rule that orders of the type contested here are non-appealable interlocutory rulings.

Collateral orders must "'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 431 (1985) (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). The June 1996 contempt order that petitioners appealed did not have these characteristics. It did not "conclusively" determine an issue, as the reasons for petitioners' contempt and the potential remedies therefor remain open for consideration by the district court after investigation by the special master.[7] Nor did the order address an issue that was "completely separate from the merits" of the action. To the contrary, the issue the order addressed—whether petitioners had complied with the district court's earlier remedial orders—is one of the central issues before the district court. And the decision will not be rendered "unreviewable" absent immediate appeal. When the district court imposes a remedy for petitioners' contempt, petitioners should be able to seek review not only of the remedy but of the underlying finding of

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[7] The June 1996 order did not even conclusively resolve any questions surrounding the appointment of a special master, as the district court did not appoint the special master and set forth his powers until it issued its July 1997 reference order (which is not properly before this Court). See pp. 6-7, *supra*.

contempt—as embodied in the district court's June 1996 order—as well.

Nonetheless, petitioners appear to argue that, even if private litigants would not be permitted to appeal under the collateral order doctrine, they as representatives of a state institution should be permitted to do so. See Pet. 13. That argument is not supported by *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), upon which petitioners' rely. There, the Court determined that orders denying claims of Eleventh Amendment immunity, like those denying claims of qualified immunity, should be immediately appealable. The Court reasoned that, because Eleventh Amendment immunity is an immunity "from suit"—immunity from "the costs and general consequences" of subjecting public officials to risk of discovery and trial—it would be forfeited if review of an order denying immunity could be obtained only after judgment on the merits. *Id.* at 143-144. Because petitioners here do not claim immunity from suit but merely assert substantive or procedural error that will be fully reviewable on appeal from a final judgment, *Puerto Rico Aqueduct* does not counsel application of the collateral order doctrine. See *id.* at 145 (If "the Eleventh Amendment does not confer immunity from suit, but merely a defense to liability," then "petitioner arguably would not be entitled to avail itself of the collateral order doctrine").[8]

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[8] Moreover, to the extent petitioners seek to rely on principles underlying the Eleventh Amendment such as state sovereignty, those claims are not properly before the Court. The conditions to which petitioners object as unduly intrusive into state functions were imposed not by the June 1996 order that petitioners appealed, but rather by the July 1997 order to which petitioners consented. See pp. 6-7 & 12 n.6, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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